TABLE OF CONTENTS

Page

Petition for Rehearing on Denial of Certiorari 1

Conclusion 10

Certificate under Rule 58 11

Certificate of Service 12

Appendix (Circuit Court, Polk County, orders)

Order of December 22, 1969 ..... A-1

Order of March 2, 1970 ..... A-3

TABLE OF CASES

Brotherhood of R. Trainmen v. *Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109, 22 L.Ed 2d 344 (March 25, 1969) 2

Seaboard Coast Line R. Co. v. *Brotherhood of of Locomotive Engineers, et al.*, No. 477 before this court 2, 5

Tampa Phosphate R. Co. v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387 (CA 5th, 1969) 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

NO. 877

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

vs.

SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

Petitioner herein, Tampa Phosphate Railroad Company (Tampa) pursuant to Rule 58 of the Rules of the Supreme Court prays rehearing of the order of February 24, 1970, denying Tampa's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and respectfully shows:

1. The petition for certiorari was filed on November 24, 1969, and denied on February 24, 1970, and subsequently to the filing there have been intervening circumstances showing that the opinion of the Court of Appeals of which review is sought presents serious questions as to the extent of the supervisory or appellate power of the United States District Courts over the initial exercise by the state courts of their inherent jurisdiction where the power of the United States District Courts to interfere with and supervise state judicial

action in disregard of 28 U.S.C. §2283 is drawn from court-formulated "paramount federal policies" and "paramount federal interests" rather than, "as expressly authorized by Act of Congress."

2. The source of the power to disregard §2283 was found in court-formulated "paramount federal policies" in *Brotherhood of R. Trainmen* v. *Terminal Co.*, 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed 2d 344 (March 25, 1969); but that decision was by a seven-judge court which divided four to three, and the then Chief Justice, one of the majority of four, is no longer on the Court, and whether such power does exist is again before this court in No. 477, *Seaboard Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, et al, argued March 2 and 3, 1970.

3. In the instant case, the source of the power to disregard §2283 was found by the Court of Appeals to exist in "paramount federal interests" (A. 15).[1] The extent of such non-statutory power to disregard §2283 is squarely presented by the instant case as well as by No. 477, *Seaboard Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers et al*, now upon the breast of the Court, and in each case that serious question of Federal law should be passed upon and decided by this Court. In No. 477, if the Federal injunction does not fall within the ban of Norris-LaGuardia (29 U.S.C. §§101, et seq.) it would seem that the issue of court-formulated power to disregard §2283 cannot be escaped.

4. We point out below that in this case both the suggestion of the Court of Appeals on the one hand, and the suggestion of the Department of Justice and the

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[1] The opinion of the Court of Appeals is now reported in the Federal Reporter advance sheets of February 2, 1970, as *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F 2d 387 (CA 5th October 1, 1969, rehearing denied October 24, 1969). The adoption of the "paramount federal interests" test is found on page 394 of the advance sheet, but references herein are to the opinion as printed in the Appendix (A. 15).

Interstate Commerce Commission on the other hand, either of which would ordinarily be grounds for refusing certiorari, are illusory. The Court of Appeals remanded the cause to the District Court for further proceedings not inconsistent with its opinion, saying in the same breath that it doubted if further proceedings were possible without the consent of the Interstate Commerce Commission, while the Department of Justice and the Interstate Commerce Commission, as grounds for refusing certiorari, argued that no statute of limitations had run against the convening of a three-judge District Court under the Urgent Deficiencies Act and that Tampa's remedy was to have the Commission's order reviewed before such a court.

5. The Court of Appeals said that Tampa, *by means of a unilateral decision,* should not be permitted to modify its proposed railroad (A. 33). Does the Court of Appeals actually mean that Tampa must get the consent of the Interstate Commerce Commission to modify its proposal? Tampa carefully amended the complaints in the condemnation actions and its proposal so as to limit both to intrastate commerce, a course which the opinion of the Court of Appeals calls a "gambit" and forbids (A. 34). The resort to the Commission became an imprisonment.

6. Tampa does not seek to operate in interstate commerce. Tampa seeks a judicial determination in the state courts under the state condemnation statutes that its proposal as amended is in intrastate commerce entitling it to invoke the power of the state courts to permit it to cross with its track the track of the Seaboard Coast Line upon the payment of just compensation. If

Tampa was condemning non-railroad property for its proposed intrastate operation would the state courts be impotent to determine their own jurisdiction to proceed?

7. The suggested remand by the Court of Appeals to the Federal district court, which Chief Judge Brown said would be a "water haul" for Tampa (A. 40), and the suggested convocation of a three-judge district court, would serve no purpose but delay. The federal question is now properly before this Court on this petition for certiorari and should be decided at this time.

8. Upon remand, the District Court would be compelled to find (a) that Tampa had not secured the permission of the Interstate Commerce Commission to modify and limit its proposal to intrastate commerce and (b) that the Court of Appeals had said that neither the District Court nor the state courts were competent to try the issue as to the character of the commerce in the absence of such permission, so that the present preliminary injunction (A. 156-162) would be made permanent and would of course be affirmed by the Court of Appeals, and, a year or two from now, Tampa would again be before this Court by certiorari, pointing out that both opinions of the Court of Appeals were in unwarranted disregard of §2283.

9. The convocation of a three-judge district court would not decide the question, as presumably the injunction issued by the District Court as modified by the Court of Appeals would remain in effect, with further proceedings in the District Court stayed. Upon review by the three-judge district court, there would obviously be *some* evidence to support the Commission's finding of no public necessity and convenience for operation *in interstate commerce,* which finding would consequently be upheld by the three-judge district court and the preliminary injunction would thereupon be made permanent

by the one judge district court and a year or so later Tampa would again be before this Court, this time by both certiorari and direct appeal.

10. The intervening circumstances are found in (A) the jurisdiction *presently being exercised* by the Circuit Court of Polk County, Florida,[2] the very court enjoined in this case, with trial set for May 20, 1970, to decide the very question as to the character of the very traffic to Port Sutton, which the Court of Appeals, and this Court by denial of certiorari, refuse to permit that very same state court to pass upon in Tampa's case, and (B) the oral argument before this Court on March 2 and 3, 1970, in the case No. 477, *Seaboard Coast Line R. Co. v. Brotherhood of Locomotive Enginers, et al.*

11. The state court action in which that jurisdiction is being exercised is a suit for overcharges brought by International Minerals and Chemical Corporation against the respondent herein, Seaboard, in the Circuit Court of Polk County, Florida in which the plaintiff should recover if the traffic to Sutton is intrastate. The complaint in that action is reproduced in pertitioner's Appendix (A. 187).

12. The Claim for undercharge was made by letter dated May 26, 1969 (A. 176). Following receipt of that claim Seaboard applied, on July 16, 1969, to the Interstate Commerce Commission, advising the Commission of that claim and asking for a declaratory order that the traffic involved was interstate in character for all purposes (A. 172), alleging that that question had been decided by the Commission in Finance Docket No. 23688, which embraced Finance Docket No. 23718, the very Finance Docket in which the Commission, for the pur-

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[2] Orders of December 22, 1969, and March 2, 1970, reproduced in the Appendix hereto (Appendix herewith, p 1-3).

pose of asserting its jurisdiction and denying Tampa's motion to dismiss its own application, found the traffic to be interstate (A. 118-119). The Commission, however, by order dated October 28, 1969 (A. 194), "in the exercise of our discretion in this matter, in which the issue is now before the court" refused to issue the requested declaratory order (A. 194).

13. The Court of Apppeals in Tampa's case refused to let that very state court inquire into the character of the traffic because the Commission had found it to be interstate. The Commission refused to issue a declaratory order that the traffic was interstate because that very issue was pending before that very state court in the undercharge suit. If the state court had no jurisdiction in Tampa's condemnation action, because of that decision in Finance Docket No. 23688, does the state court have jurisdiction in the undercharge action solely because the Interstate Commerce Commission now refuses to say what it did hold in Finance Docket No. 23688? The result is a procedural shambles which this Court should resolve.

14. The complaint in the undercharge action is reproduced in Petitioner's Appendix herein (A. 187) as are also the Seaboard's Motion to Dismiss, Motion to Strike and Motion for More Definite Statement (A. 192), which motions had not been ruled upon by the state court at the date of the petition for certiorari herein. Those motions have now been ruled upon by the state court, by order of the Circuit Court of Polk County dated December 22, 1969, of which a copy is annexed hereto (Appendix herewith, p. 1).

15. The respondent Seaboard's motion to dismiss the undercharge case was made on the grounds that the state court lacked jurisdiction to determine whether the character of the movement of the phosphate rock to Sutton was intrastate or interstate for the reason that

the exclusive or primary jurisdiction to determine that question is in the Interstate Commerce Commission or the Florida Public Service Commission, and, furthermore, that, "it affirmatively appears from the allegations of the Complaint that the shipments involved are shipments in interstate commerce." (A. 192)

16. The state court denied the Seaboard's motion to dismiss (Appendix hereto, p. 1) saying:

> "The Court heard the arguments of counsel for the parties and, after consideration, concludes, concerning the Motion to Dismiss, that this Court has jurisdiction of the subject matter of the complaint; that the exclusive or primary jurisdiction of the subject matter of the complaint is not vested in the Interstate Commerce Commission or the Florida Public Service Commission; that it does not affirmatively appear from the allegations of the complaint that the shipments involved are shipments in interstate commerce; and that the complaint states a cause of action."

The ordering paragraph denied the motion to dismiss in its entirety. The order also denied the motion for a more definite statement on the ground that the information requested could be obtained by interrogatories and depositions, but granted the motion to strike the portion of the prayer for relief seeking penalties of 50% and attorneys fees (Appendix hereto, p. 1-2).

17. Seaboard then served Requests for Admissions on February 3, 1970, requesting admissions, among other things, that the phosphate rock (3b) "is not intended to come to final rest in Sutton, Florida", (3c) "is not intended to come to final rest in the State of Florida", and (3g) "is not to be transported to any final resting place

in Florida". Objections to those requests were made and sustained by the state court by order dated March 2, 1970, in which that court said:

> "The Court has heard the argument of counsel for the parties and has concluded that the requests for admissions to which plaintiff has objected request the admission of conclusions of law and fact and request the admission of controverted central issues of fact which might be dispositive of the cause. As such, it is the opinion of the Court that such requests are improper and the plaintiff's objections should be sustained."

Copy of that order is attached (Appendix hereto, p. 3).

18. If there is a judicial determination in the undercharge case that the traffic is intrastate in character, how is Tampa to get into *any* court to present the same evidence that was produced in that case? The Court of Appeals has absolutely precluded Tampa from going into the state court, has said that Tampa may not produce additional or different evidence in the Federal one-judge district court absent the consent of the Interstate Commerce Commission, and, as a matter of settled law, evidence in addition to that presented to the Commission is not permitted before a three judge district court convened under the Urgent Deficiencies Act.

19. The undercharge case in the Circuit Court of Polk County is now in precisely the same procedural status as was Tampa's Polk County condemnation action when the Federal District Court stepped in and stopped further proceedings. Up to the moment of writing, however, Seaboard has not yet applied to the Federal District court to stay further proceedings in the undercharge case, although it has between now and May 20,

1970 to do so and to bring about the same result, if this Court upholds the exercise by the Federal District Court of that power upon court-formulated notions of paramount federal interests.

20. The opinion of the Court of Appeals in this case requires correction by this Court for reasons far beyond the fact that it is, as we contend, plainly wrong. If the *nisi prius* state court goes wrong, in No. 477 as well as in this case, there is appellate review in the state courts and final scrutiny by this Court on certiorari. The damage of the opinion of the Court of Appeals is the extension of the power of the Federal district courts to restrain and supervise the state courts, not by virtue of express authority of an Act of Congress but upon court-formulated notions of paramount federal policies and paramount federal interests.

21. At the oral argument in No. 477 counsel for the Brotherhood repeatedly referred to the "totality" of the regulation of the Florida East Coast as making the situation disclosed in No. 477 "the strongest case possible" for limiting the application of state law and overriding the state court injunction, by leaving in force the counter-injunction of the Federal District Court. The argument was that the Federal government had an "enormous" stake in seeing that the Brotherhood was able to possess and use its economic power to prevent the receipt and delivery of freight by the Florida East Coast and to bring the Florida East Coast to its knees. That argument was simply a request for the same court-formulated extension of the power of the Federal district courts, which, ironically, the Seaboard resists in No. 477 and supports in No. 877.

CONCLUSION

The facts that the Interstate Commerce Commission has refused to intervene when asked by Seaboard because the question is pending before a court and that the Circuit Court of Polk County is proceeding to adjudicate the character of the commerce, show on their face that the reasons given by the Court of Appeals for preventing the resolution of the same question by the same court at the instance of Tampa are specious.

It is respectfully submitted that the encroachment by the Federal district courts in No. 477, and in this case, No. 877, upon the admitted inherent jurisdiction of the state courts, threatens the destruction of the traditional relationships of the Federal and state courts, and that this case, particularly because of the exposition in the opinion of the Court of Appeals, as well as the situation disclosed in No. 477, call for the review and restraint by this Court of such encroachment and that this petition for rehearing should be granted.

Dated at Tampa, Florida March 18, 1970.

Respectfully submitted,

s/ JAMES B. MCDONOUGH, JR.

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CERTIFICATE UNDER RULE 58

The undersigned, pursuant to the requirement of Rule 58 of the Rules of this Court, hereby certifies that this Petition for Rehearing on Denial of Certiorari is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial or controlling effect and other substantial grounds available to Petitioner although not previously presented.

Dated at Tampa, Florida, March 18, 1970.

/s/ James B. McDonough, Jr.

JAMES B. MCDONOUGH, JR.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 18th day of March, 1970, one copy of the foregoing Petition for Rehearing was furnished by mail to William A. Gillen, Esq., and one copy also by mail to James E. Thompson, Esq., both of Messrs. Fowler, White, Gillen, Humkey and Kinney, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to Erwin N. Griswold, Esq., Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C. and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/ James B. McDonough, Jr.

Counsel for Petitioner

APPENDIX

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR POLK COUNTY, FLORIDA.
CIVIL ACTION

INTERNATIONAL MINERALS & CHEMICAL CORPORATION, a New York corporation,
Plaintiff,

vs.) CASE NO. 69-2560

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia corporation,
Defendant.

ORDER

This matter came before the Court on December 18, 1969 for hearing on defendant's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement. The Court heard the arguments of counsel for the parties and, after consideration, concludes, concerning the Motion to Dismiss, that this Court has jurisdiction of the subject matter of the complaint! that the exclusive or primary jurisdiction of the subject matter of the complaint is not vested in the Interstate Commerce Commission or the Florida Public Service Commission; that it does not affirmatively appear from the allegations of the complaint that the shipments involved are shipments in interstate commerce; and that the complaint state a cause of action. Concerning the Motion to Strike, the Court concludes paragraph 9 of the complaint, as alleged in Count I and realleged by reference in Count II, does not contain allegations which, if proven, would be sufficient to justify plaintiff's claim for interest at the rate of 50% per annum in accord with the provisions of Sections 353.01 and 353.02, Florida Statutes, or plaintiff's claim

for attorneys' fees in accord with the provisions of Section 353.03, Florida Statutes. Concerning the Motion for More Definite Statement, the Court concludes that the information which is requested in the Motion for More Definite Statement can be obtained by interrogatories and depositions in accord with the provisions of the Florida Rules of Civil Procedure; and that the complaint is not so vague or ambiguous that defendant cannot reasonably be required to frame a responsive pleading thereto. It is accordingly,

ORDERED AND ADJUDGED that defendant's Motion to Dismiss is denied in its entirety. It is further,

ORDERED AND ADJUDGED that defendant's Motion to Strike is granted. Paragraph 9 will be stricken from both Count I and Count II of the complaint. That part of the prayer for relief of Count I which reads "plus interest at the rate of 50% per annum from May 26, 1969; attorneys' fees in an amount not to exceed 15% of the amount recovered;" will be deleted also. It is further,

ORDERED AND ADJUDGED that defendant's Motion for More Definite Statement is denied.

DONE AND ORDERED in Chambers at Bartow, Polk County, Florida, this 22nd day of December, 1969.

/s/ J. H. Willson

As Circuit Judge

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR POLK COUNTY, FLORIDA.

CIVIL ACTION

INTERNATIONAL MINERALS & CHEMICAL CORPORATION, a New York corporation,
Plaintiff,

vs.) CASE NO. 69-2560

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia corporation,
Defendant.

ORDER

This matter came before the Court on February 26, 1970 for hearing on Plaintiff's Objections to Defendant's Requests for Admissions Numbers 3(b), 3(c), and 3(g), served on plaintiff on February 19, 1970.

The Court has heard the argument of counsel for the parties and has concluded that the requests for admissions to which plaintiff has objected request the admission of conclusions of law and fact and request the admission of controverted central issues of fact which might be dispositive of the cause. As such, it is the opinion of the Court that such requests are improper and that plaintiff's objections should be sustained. It is, therefore,

ORDERED AND ADJUDGED that Plaintiff's Objections to Defendant's Requests for Admissions Numbers 3(b), 3(c), and 3(g) are hereby sustained.

DONE AND ORDERED in Chambers at Bartow, Florida, this 2nd day of March, 1970.

/s/ J. H. Willson

As Circuit Judge